No. 89-1886

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

ROY HERBERGER, TRUSTEE FOR THE LEE OPTICAL AND ASSOCIATED COMPANIES PENSION PLAN TRUST,

Petitioner,

vs.

THEODORE SHANBAUM.

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

LAW OFFICES OF
JOE B. ABBEY
1717 Main Street
Suite 2220
Dallas, Texas 75201
(214) 748-0423
Counsel for Respondent

June 28, 1990

QUESTIONS PRESENTED

1. Was the Fifth Circuit reversal consistent with Supreme Court Decisions in that the Shanbaum State Court judgment was not brought for a prohibited transaction under ERISA?
2. Does the State Court have subject matter jurisdiction to render a judgment under ERISA?
3. Did Herberger, trustee, have authority to bring this action since there was not committee approval of such action?

PERTINENT CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

This case involves the following statutes:

29 U.S.C. Section 1056(d)(1):

> Each pension plan shall provide that benefits provided under the plan shall not be assigned or alienated.

29 U.S.C. Section 401(a)(13):

> A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated. For purposes of the preceding sentence, there shall not be taken into account any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment made by any participant who is receiving benefits under the plan unless the assignment or alienation is made for purposes of defraying plan administration costs. For purposes of this paragraph a loan made to a participant or beneficiary shall not be treated as an assignment or alienation if such loan is secured by the participant's accrued nonforfeitable benefit and is exempt from the tax imposed by section 4975 [26 U.S.C.S. Section 4975] (relating to tax on prohibited transactions) by reason of section 4975(d)(1) [26 U.S.C.S. 4975(d)(1)]. This paragraph shall take effect on January 1, 1976 and shall not apply to assignments which were irrevocable on September 2, 1974.

29 U.S.C. Section 1109(a):

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

29 U.S.C. Section 1106(b):

> Transactions between plan and fiduciary. A fiduciary with respect to a plan shall not —
>
> > (1) deal with the assets of the plan in his own interest or for his own account,
> >
> > (2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or
> >
> > (3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

29 U.S.C. Section 1132(a)(2) and (e)(1):

> (a) Persons empowered to bring a civil action. A civil action may be brought —
>
> > (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [29 U.S.C. Section 1109];
>
> (e) Jurisdiction.
>
> > (1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

LIST OF PARTIES

1. Roy Herberger, Appointed Trustee for the Lee Optical and Associated Companies Pension Plan Trust
2. Theodore Shanbaum — Respondent
3. David Witts, Richard A Dean and Patricia M. Reed of Arter & Hadden — Counsel for Petitioner

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vs.

THEODORE SHANBAUM,

Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

Respondent respectfully requests that the petition for Writ of Certiorari be denied.

STATEMENT OF THE CASE

The opinion of the United States Court of Appeals Fifth circuit correctly sets forth the statement of facts in this case.

Theodore Shanbaum ("Shanbaum") along with Ellis Carp ("Carp") and Glenn Auerbach ("Auerbach"), were the three principle shareholders of Lee Optical, Inc. ("Lee Optical"). All three served as charter trust-

ees of the Lee Optical and Associated Companies Pension Plan (the "Pension Plan"), which was created in 1951. They also were charter trustees of the Lee Optical and Associated Companies Profit Sharing Plan ("Profit Sharing Plan"). Shanbaum was also an employee beneficiary of the Pension Plan. He is now 78 years old, a pauper, and draws a monthly pension of $3,521.87.

In 1980 disputes arose between the Shanbaum family and the Carp family which resulted in Shanbaum's resignation as officer and director of Lee Optical. Beginning in 1980, the U.S. Secretary of Labor initiated an action against Shanbaum, Carp, Lee Optical, and its subsidiary Dal-Tex, alleging violations of ERISA (29 U.S.C. section 1109(a) in connection with the practice of contributing secured promissory notes instead of cash to the Plans. Shanbaum resigned as trustee September 21, 1981 by a Consent Decree.

Roy Herberger ("Herberger"), Plaintiff/Petitioner was appointed by the court as trustee of the Plan in 1983. David Witts ("Witts"), now with the law firm of Arter and Hadden, has represented the Pension Plan and Profit Sharing Plan since 1983 in conjunction with Herberger. Herberger and Witts are strangers to the Pension Plan and Profit Sharing Plan in that they were never shareholders, officers, employees of the sponsoring company, or beneficiaries of either Plan. The investment responsibilities of the Plans have been handled by Fisher Capital Management, Investment Bankers in New York. Herberger and Witts commenced to bring litigation against past trustees of the Plan, their attorneys and the sponsoring company, Lee Optical.

In September of 1986, the sponsoring company, Lee Optical, appointed three new members to the Pension Plan committee. However, Herburger and Witts refused

all communication with any members of the committee as ordered by the Plan. Thereafter, a business decision was made by the shareholders that the investment in Lee Optical was not worth a long term dispute with Herberger and Witts. Lee Optical was liquidated and the employee beneficiaries of the Pension Plan and the Profit Sharing Plan lost their jobs. The vexatious litigation brought by Herberger and Witts was the sole reason Lee Optical closed its doors. The obligations of the sponsoring company to the plans could have been met without the excessive administrative expense and attorneys fees incurred by Herberger and Witts.

During the pendency of these controversies, an unrelated lawsuit was filed in a Texas State Court by W.F. DeTournillon who at one time had been an employee of the Grayson Enterprises, Inc. ("Grayson"). Shanbaum, the Pension Plan and Carp had been the sole shareholders of Grayson, which had been liquidated in 1982. DeTournillon sought to recover salary and bonuses earned while he was an employee of Grayson and since that corporation was defunct, he sued its successors Shanbaum, Carp's estate and the Pension Plan.

Herberger and Witts settled with DeTournillon for $20,000.00. In September of 1986, the state court awarded plaintiff a judgment against Shanbaum and the Carp estate and also awarded the Pension Plan a $20,000.00 indemnification judgment against Shanbaum. Counsel for the Pension Plan cunningly inserted the language "for the breach of his fiduciary duty as trustee" even though this was a clear case of an employee/employer relationship and had nothing to do with ERISA. The Pension Plan judgment against Shanbaum proved uncollectable and Herberger sought an order from the Federal District Court to allow the

Plan to offset the outstanding judgment against Shanbaum's monthly pension benefit. Shanbaum is a pauper with no source of income except the Pension Plan and social security benefits. The District Court entered judgment allowing the offset. Shanbaum appealed and the Honorable United States Court of Appeals Fifth Circuit reversed.

Petitioners' statement of the case seeks to mislead the Honorable Supreme Court of the United States in that this case has nothing to do with Shanbaum's conduct as a trustee. Therefore it falls directly under the *Guidry v. Sheet Metal Workers National Pension Fund*, 110 S.Ct. 680 (1990). The DeTournillon case was a suit for indemnification as a joint shareholder and had nothing to do with any fiduciary duty to the Pension Plan.

Similarly, petitioners' inflamatory comment that "the Plan currently has a judgment against Shanbaum based upon his breaches of his fiduciary duty to it but cannot satisfy that judgment or offset against the generous benefits it is currently paying him all at the expense of the participants and beneficiaries whose trust he betrayed" in groundless. The DeTournillon suit has nothing to do with ERISA or any trust of the beneficiaries of the Pension Plan. Shanbaum's benefits were earned by Shanbaum over forty years of work. It was Shanbaum and Carp that funded the Plan. Indeed, Shanbaum voluntarily cashed in the benefits of $1,300,000 in the Profit sharing Plan and loaned the money to Lee Optical to pay its obligations requested by the Department of Labor. The DeTournillon judgment is presently the only judgment against Shanbaum by either Plan.

Petitioners conclude their brief by stating "after having improperly used the pension plan assets . . ." The statement is untrue. Nowhere has Shanbaum abused the

Plan for his personal gain. No case has ever found Shanbaum guilty of fraud or criminal conduct. *Whitfield v. Lindemann*, 853 F.2d 1298 (5th Cir. 1988) cert denied sub nom., *Klepak v. Dole*, 109 S.Ct. 2428 (1989); *McLaughlin v. Lindemann*, 853 F.2d 1307 (5th Cir. 1988); *Herberger v. Shanbaum*, 899 F.2d 801 (5th Cir. 1990).

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

The Fifth Circuit's reversal of Petitioner's judgment did not conflict with the decision of *Guidry v. Sheet Metal Workers National Pension Fund*, 110 S.Ct. 680 (1990). Like *Guidry*, the judgment against Shanbaum had nothing to do with ERISA or Shanbaum's conduct as trustee of the Pension Plan. This was a state court action that had nothing to do with prohibited transactions set forth in ERISA. Therefore, the issue is decided in the *Guidry* case.

The language slipped in the state court judgment "for the breach of his fiduciary duty as trustee" by counsel for the Pension Plan, instantly rendered the judgment void on its face for lack of subject matter jurisdiction. The United States District Court has exclusive subject matter jurisdiction for suits under ERISA.

The trustee Herberger had no authority to bring this suit without committee approval pursuant to the provisions of the Pension Plan.

ARGUMENT

I. THE FIFTH CIRCUIT REVERSAL WAS CONSISTENT WITH SUPREME COURT DECISION IN THAT THE SHANBAUM JUDGMENT WAS NOT BROUGHT FOR A PROHIBITED TRANSACTION UNDER ERISA

Petitioner, through misleading statements to this Honorable Supreme Court, argues that the Fifth Circuit decision seriously skews the balance between the enforcement provisions and the rights for pension benefits from the Plan. Petitioner is wrong. The only skewed conduct is the insertion of the language of the state court judgment of "breach of a fiduciary duty as a trustee" by Petitioner.

29 USC Section 1056(d)(1) provides that each pension plan may *not* be assigned or alienated. ERISA Section 206(d)(1). A provision almost identical is found in the companion tax provisions to ERISA in the Internal Revenue Code wherein assignment or alienation of benefits is also prohibited if a pension plan is to be qualified for tax benefits. See 26 USC Section 401(A)(13).

This court has stated in *Guidry* that no equitable exceptions to ERISA's prohibition on the assignment or alienation of pension benefits should be recognized by the courts. The identification of any exceptions should be left to Congress.

Shanbaum has not been found to have breached any fiduciary duty to the Pension Plans as trustee, despite the language in the state court case. The DeTournillon state court suit was not based on an ERISA claim. 29 U.S.C. section 1109(a) provides in pertinent part "any person who is a fiduciary with respect to a plan who

breaches any of the responsibilities, obligations or duties imposed upon a fiduciary *by this subchapter* . . ." (Emphasis supplied.) 29 U.S.C. section 1106 lists prohibited transactions between the plan and the fiduciary. The DeTournillon state court claim was merely a suit against an employer, Grayson and its three shareholders, by an employee of Grayson after its dissolution.

The DeTournillon state court action was not brought by the Secretary of Labor, a participant, a beneficiary, or a fiduciary of the Plan. The suit was for past compensation against the corporation which was partially owned by the Pension Plan. 29 U.S.C. section 1132(a)(2).

The DeTournillon's state court judgment dated September 18, 1986 with the inserted language "breach of fiduciary duty as trustee" was in conflict with the Consent Order dated September 21, 1981, removing Shanbaum as trustee. Lindemann was trustee at the time the suit was filed.

The DeTournillon state court judgment found no judgment of breach of prohibited acts under ERISA and there were no facts alleged or found that Shanbaum benefited as a result of the claim for back salary of an employee of Grayson.

In sum, the alleged breach of fiduciary duty as trustee by Shanbaum is a myth, perpetrated by Petitioner in his attempt to portray Shanbaum as an unfaithful trustee. Like the *Guidry* decision, this case is not a suitable decision to decide whether the remedial provisions contained in 409(a) supercede the bar on alienation in section 206(d)(1) since as a matter of fact, Shanbaum has not breached any fiduciary duty to the Pension Plan. The Petitoner's arguments that ERISA's anti-alienation provision and the decision in *Guidry* do not preclude

offset fail for lack of factual foundation of an unfaithful Trustee to his plan.

II. STATE COURT HAS NO SUBJECT MATTER JURISDICTION TO RENDER A JUDGMENT UNDER ERISA

29 U.S.C. section 1132(e)(1) provides in pertinent part "... the District Court of the United States shall have exclusive jurisdiction for Civil actions under this subchapter brought by the Secretary or by a participant or beneficiary or fiduciary."

The DeTournillon suit was not brought by the Secretary or by a participant, beneficiary or a fiduciary of the Plan. Nor was it bought under ERISA for liability for breach of a fiduciary duty or for a prohibited transaction 29 U.S.C. section 1106, 29 U.S.C. section 1109, 29 U.S.C. section 1104. Therefore, any finding that Shanbaum had breached his fiduciary duties as a trustee of the Pension Plan renders the judgment void on its face for lack of subject matter jurisdiction. While this issue was not addressed by the Honorable Court of Appeals for the Fifth Circuit, the issue renders this case unsuitable for the acceptance of the petition for writ of certiorari.

The preemptive clause in 29 U.S.C. section 1144 states that the provisions of ERISA shall supercede any and all state laws. This Honorable Court held in *Pilot Life Ins. Co. v. Dedeaux*, 107 S.Ct 1549 (1987), that the preemption clause of ERISA provides that ERISA supercedes all state laws insofar as they relate to employee benefit plans.

Under Texas law, a void judgment is a complete nullity and is without binding force in effect in either a tribunal which rendered it or any other court in which it may be brought in question. A void judgment is

subject to direct attack but also can be attacked collaterally in any other setting where rights are asserted under it. A judgment is void if the court rendering it has no jurisdiction of the subject matter of the suit. *Salazar v. U.S. Air Force*, 849 F.2d 1542 (5th Cir. 1988). *Steph v. Scott*, 840 F.2d 267 (5th Cir. 1988) *Robertson v. Ranger Ins. Co.*, 689 S.W.2d 209 (Tex. 1985); *Austin Independent School District v. Sierra Club*, 495 S.W.2d 878 (Tex. 1973); Hodges, *Collateral Attacks on Judgments* 41 Tex. L.Rev. 163 (1962). If a judgment is rendered by a court which lacks subject matter jurisdiction of the action, the judgment may be set aside by collateral attack and extrinsic evidence may be introduced to show the court lack of subject matter jurisdiction. *Nugent v. Nugent*, 270 S.W.2d 223 (Tex. Civ. App. — Beaumont, 1954, no writ); *McEwen v. Harrison* 162 Tex. 125, 345 S.W.2d 706 (Tex. 1969). Moreover, a question of subject matter jurisdiction can be raised at any time and cannot be waived. A void judgment is subject to collateral attack at any time and at any proceeding. *Soloman v. Massachusetts Bonding and Ins. Co.*, 347 S.W.2d 17 (Tex. Civ. App. 1961, writ ref'd); Hodges, *Collateral Attacks on Judgments* 41 Tex. L. Rev. 163 (1962).

III. HERBERGER HAD NO AUTHORITY TO BRING THIS ACTION SINCE THERE WAS NOT COMMITTEE APPROVAL OF SUCH ACTION.

Since the appointment of Herberger and the employment of Witts, the Profit Sharing Plan and Pension Plan have operated alone without constraint. Without checks and balances the Plans turned predator and devoured its former trustees and sponsoring company. Everyone that has touched Lee Optical has been sued, harassed, embarrassed, and run off. Lee Optical could have maintained its obligations to the Plans. Indeed, until 1982, the Plans were overfunded

On December 31, 1980, the audited assets available for beneficiaries of the Pension Plan was $7,381,430.00. On December 31, 1980, the audited assets available for beneficiaries of the Profit Sharing Plan was $7,051,201.00. At that time, both the Pension Plan and Profit Sharing Plan were overfunded for their obligations to the beneficiaries of the respective plans

By December 31, 1988, (the last reported statement) the certified assets available to beneficiaries under the Pension Plan was reduced to $1,997,202.00. By December 31, 1988 (the last reported statement) the certified assets available to beneficiaries of the Profit Sharing Plan was reduced to $4,488,754.00. Both the Pension Plan and Profit Sharing Plan are presently underfunded in that they do not have sufficient assets to pay their obligations to the beneficiaries. The difference must now be made up by the Pension Benefit Guarantee Corporation.

The following table shows the administrative costs and attorney fees for the years 1977 to 1982 at which time Shanbaum, Carp, and Lindemann administered the Profit Sharing Plan and the Pension Plan.

Years	Pension Plan	Profit Sharing Plan
1977.....	$ 17,600.00	$ 18,941.00
1978.....	$ 21,500.00	$ 20,906.00
1979.....	$ 38,000.00	$ 30,800.00
1980.....	$ 45,046.00	$ 41,171.00
1981.....	$124,627.00	$ 80,672.00
1982.....	*not available*	*not available*
	$246,773.00	$192,590.00

The following table represents the stated administrative fees and attorneys fees incurred by Herberger and Witts since 1983.

Years	Pension Plan	Profit Sharing Plan
1983.....	$ 205,623.00	$ 183,535.00
1984.....	$ 231,018.00	$ 204,612.00
1985.....	$ 194,840.00	$ 227,653.00
1986.....	$ 279,724.00	$ 155,527.00
1987.....	$ 238,649.00	$ 133,371.00
1988.....	$ 227,663.00	$ 143,200.00
	$1,377,517.00	$1,047,898.00

A comparison of the six year total of $444,283.00 prior to the expenses charged by Herberger and Witts of $2,425,415.00 represents almost a 600% increase.

Herberger has acted without committee approval to conduct business and file this suit. Pursuant to Article 10 of the Pension Plan, the Plan shall be administered by a retirement committee consisting of at least three per-

sons. Paragraph 10.2 *Committee Powers and Duties*, of the Plan provides in pertinant part "a majority of the members of the committee, which must include the planned administrator, shall constitute a quorum for the transactions of business. No action shall be taken except upon a majority vote of the committee members"

The Pension Plan merely echoes the command of ERISA. ERISA defines "administrator" as "the person so designated by the terms of the instrument under which the plan is operated", 29 U.S.C. section 1002(16). The Plan in this case expressly names a retirement committee as administrator of the Plan. The committee should conduct the business of the Plan and not the trustee. ERISA discusses the authority of the trustee of the plan "to manage and control the assets of the plan" but makes no mention of the authority for operating the plan or the plan's business which is left to the administrator, 29 U.S.C. section 1103.

There has been no committee acting nor has one been appointed pursuant to the Plan. Furthermore, no committee has met since September of 1986 when they were rebuffed by Witts. Herberger has moved from Dallas, Texas to Phoenix, Arizona. The Plan has been run defacto by Witts who brought the present action against Shanbaum. Herberger and Witts have no authority to conduct business or to bring this suit without approval of the committee. Herberger has exceeded his authority as trustee by bringing this action.

While Herberger was appointed pursuant to a suit filed by the Department of Labor, the order supplementing the Consent Order calls for the appointment of a retirement committee pursuant to Article 10 of the Pension Plan. However, the Plan has never been amended as required by ERISA, the Internal Revenue

Code, or the Department of Labor calling for sole authority into Herberger. The Internal Revenue Service has never approved any modification to the original plan for tax benefits. In his present status, the trustee is not answerable to anyone for his conduct incurring administrative and attorney's fees including the Internal Revenue Service, ex-employees, the beneficiaries or the liquidated sponsoring company.

The review by the Department of Labor has been impotent. Government employees in Washington, D.C. have not been able to properly control Herberger and Witts in Dallas, Texas. Not only has the sponsoring company been liquidated and the employee-beneficiaries thrown on the street, but the cost of administration has increased 600% and both the Pension and Profit Sharing Plans have been materially reduced in value.

CONCLUSION

On the merits, the Court of Appeals was correct in reversing and rendering the decision for Shanbaum. Petitioners filed their Petition in an attempt to mislead this Honorable Court in an emotional appeal that Shanbaum should not be permitted to obtain additional benefits at the expense of beneficiaries whose trust he has broken. This case has nothing to do with a disloyal fiduciary. The largest expense to both Plans, were the legal and administrative fees.

A trustee is still responsible to the Pension Plan for his conduct to the extent of all of the assets he owns. This case will not leave a Pension Plan without a remedy against disloyal fiduciaries. For the majority of cases, the trustee is not also an employee-beneficiary.

The Fifth Circuit's decision is in accordance with ERISA and this Honorable Court's decisions. The Petition for Writ of Certiorari should therefore be denied.

Respectfully submitted,

LAW OFFICES OF
JOE B. ABBEY
1717 Main Street
Suite 2220
Dallas, Texas 75201
(214) 748-0423
Counsel for Respondent

APPENDIX

JUDGMENT OF THE 162ND DISTRICT COURT OF DALLAS COUNTY, TEXAS

Signed September 18, 1986

No. 8204793-I

W.F. DETOURNILLON VS. THEODORE SHANBAUM, ESTATE OF ELLIS CARP, LEE OPTICAL AND ASSOCIATED COMPANIES RETIREMENT PENSION TRUST AND SCP., A JOINT VENTURE	IN THE 162ND DISTRICT COURT OF DALLAS COUNTY, TEXAS

FINAL JUDGMENT

On this 8th day of August, 1986, came on be heard in open Court the above-entitled and numbered cause; and came the Plaintiff and Defendant THEODORE SHANBAUM in person and through their respective attorneys of record and announced ready for trial, the Plaintiff and Defendant LEE OPTICAL and ASSOCIATED COMPANIES RETIREMENT PENSION TRUST announced that the claims by the Plaintiff against it have been settled for the sum of $20,000.00 and that it was ready in its cross-claim against Defendant THEODORE SHANBAUM, and Plaintiff further announced that Defendant THE ESTATE OF ELLIS CARP has entered into an Agreed Interlocutory Judgment that is signed and filed herein; no jury having been demanded, all

matters of fact, as well as of law, were submitted to the Court; and the Court, having heard and considered the pleadings, evidence and argument of counsel, is of the opinion and finds that the Plaintiff is entitled to judgment against the Defendants, THEODORE SHANBAUM and THE ESTATE OF ELLIS CARP, jointly and severally, for the principal sum of $168,424.61 as prayed for in his First Amended Original Petition, together with interest thereon at the rate of ten percent (10%) per annum from date of judgment until paid in full, that the Plaintiff is entitled to judgment against the Defendant THEODORE SHANBAUM for reasonable attorney's fees as stipulated into the record by the parties and cost of court; and that Defendant LEE OPTICAL AND ASSOCIATED COMPANIES RETIREMENT PENSION TRUST is entitled to judgment against Defendant THEODORE SHANBAUM for the breach of his fiduciary duty as trustee of the LEE OPTICAL AND ASSOCIATED COMPANIES RETIREMENT PENSION TRUST to said Trust in the amount of $20,000.00 as prayed for in said cross-claim.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff, W.F. DETOURNILLON, do have and recover of and from the Defendants THEODORE SHANBAUM and THE ESTATE OF ELLIS CARP, jointly and severally, judgment in the sum of $168,424.61, together with interest thereon at the rate of ten (10%) percent per annual from date of judgment until paid in full, that said Plaintiff do have and recover of and from Defendant THEODORE SHANBAUM judgment for reasonable attorney's fees of $15,000.00 for trial of the case, $5,000.00 additional attorney's fees if an appeal is perfected to the Court of Appeals, $2,500.00 additional for attorney's fees if a writ

of error is sought and $2,500.00 additional for attorney's fees if a writ of error is granted.

IT IS FURTHER ORDERED by the Court that Defendant LEE OPTICAL AND ASSOCIATED COMPANIES RETIREMENT PENSION TRUST do have and recover of and from the Defendant THEODORE SHANBAUM judgment in the sum of $20,000.00 together with interest thereon at the rate of ten (10%) percent per annum from date of judgment until paid in full.

AND IT IS FURTHER ORDERED that all cost of court are taxed against the Defendant THEODORE SHANBAUM, for all of which let execution issue.

Signed: September 18, 1986

Catherine J. Crier,
Judge Presiding

APPROVED AS TO
FORM ONLY:

Wm. Chris Wolffarth
Attorney for Theodore Shanbaum

Rodney R. Elkins
Attorney for Lee Optical and Associated Companies Retirement Pension Trust

Don R. Kidd
Attorney for Plaintiff W.F. DeTournillon

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief in Opposition was placed in the United States Mail addressed to attorney of record, Richard A. Dean, 1717 Main Street, Suite 4100, Dallas, Texas 75201, on this the 28th day of June, 1990.

Joe B. Abbey
Attorney for Respondent